Docket No. W2001-02

APPEAL OF RALPH'S RESTAURANT, INC.

Decision and Order

I. Introduction

Ralph's Restaurant ("Ralph's") appeals to the Commissioner of Insurance ("Commissioner") from a decision of the Workers' Compensation Rating and Inspection Bureau ("WCRB") Appeals Subcommittee to not recalculate Ralph's experience modification and All Risk Adjustment Program ("ARAP") factors based on Ralph's assertion that the underlying claim was fraudulent and non-compensable. The appeal is filed pursuant to G.L. c. 152, § 52D.

The Commissioner designated Janice K. Biederman, Esq., as the hearing officer for this matter. After she left the employ of the Division, Susan H. Unger, Esq., was appointed as the successor hearing officer. Ralph's was represented by William D. Cox, Jr., Esq.; the WCRB was represented by Ellen F. Keefe, Esq.; and Eastern Casualty Insurance Company ("Eastern") was represented by Mark A. Sullivan, Esq., and Frank L. McNamara, Jr., Esq.

II. Issue in Dispute

Ralph's, the WCRB, and Eastern agree that the core issue in this case is whether the underlying employee's workers' compensation claim was non-compensable. A determination that the claim, which was paid by Eastern between April 9, 1998 and December 30, 1998, was a non-compensable claim would require a recalculation of Ralph's workers' compensation experience rating plan modification in accordance with G.L. c. 152, § 53A(4).[1] The WCRB reports that Ralph's would have paid a total of $5,913 less in workers' compensation premium over the 1999, 2000 and 2001 years if the claim had never been reported. At the hearing, Ms. Keefe stated that the claim would not impact premium subsequent to those three years.

III. Facts and Procedural History

Ralph's, the WCRB, and Eastern stipulate to certain facts about the underlying workers' compensation claim, which was used for calculating Ralph's experience modification and ARAP factors, and ultimately increased its workers' compensation insurance premium.[2] The following reproduces the eighteen agreed upon facts as it appears in the parties' *Joint Statement of Facts*, unless otherwise noted:

1. Appellant is the owner and operator of Ralph's Restaurant located in Haverhill, Massachusetts.
2. At all times relevant, Eastern Casualty Insurance Company provided workers' compensation coverage to Ralph's.
3. On or about April 9, 1998, [an employee of Ralph's], alleged that she sustained injuries to her neck, left shoulder/ arm and knee when an ice cube machine door fell on her while she was in the course of her employment with Ralph's.
4. Ralph's reported the alleged incident within twenty-four (24) hours by telephone and on or about April 14, 1998, filed with Eastern an Employer's Notification to Insurer of Medical Only Injuries.

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[1] G.L. c. 152, § 53A (4), provides in pertinent part, "[w]here a claim against an insured that has affected such insured's experience rating has been found non-compensable . . . the insurer shall submit a revised statistical unit report to the [WCRB] within sixty days of such finding. . . ."

[2] An experience modification factor reflects the individual insured's own loss experience as compared to the average insured in the same classification. ARAP surcharges experience rated risks that have a record of losses greater than expected under the Experience Rating Plan.

5. On or about April 17, 1998, Ralph's filed with Eastern an Employer's First Report of Injury, which indicated that [the employee] was disabled from work and that the period of disability began on April 9, 1998.
6. Eastern commenced paying temporary total incapacity compensation benefits, without prejudice, under G.L. c. 152, §34 beginning on or about April 22, 1998 [("§34 benefits")].
7. Eastern and the Insurance Fraud Bureau (IFB) conducted fraud investigations on [the employee's claims]. At one time Eastern rented a limousine from [the employee] while she was collecting benefits.[3] Ralph's cooperated at all times with the investigations.
8. On September 21, 1998 [the employee] was examined by . . . an orthopedic surgeon at Eastern's request. [The doctor] noted that [the employee] was not at a medical end result and caus[a]lly related her activities to her alleged industrial accident and recommended that [she] gradually increase her activities in order that she could eventually return to work.
9. On December 17, 1998, [the employee] was re-examined by [the same doctor], an orthopedic surgeon at Eastern's request. [The doctor] determined that [the employee] was capable of returning to work.
10. Based on [the doctor's] findings, Eastern terminated the employee's benefits within the so called pay without prejudice period. Eastern's termination notice was sent to the employee on December 22, 1998.
11. As ground for the termination of [the employee's] benefits, Eastern stated as follows on the termination notice:
    A. Inadequate documentation and/or evidence to substantiate a personal injury.
    B. Inadequate documentation and/or evidence to substantiate an injury arose out of an [sic] in the course of employment.
    C. Inadequate documentation and/or evidence to substantiate a disability.
    D. Inadequate documentation and/or evidence to substantiate a casual relation between the alleged personal injury and the alleged disability.
    H. [sic] The insurer invokes MGL c. 152, §1(7A) that the predominate cause of the employee's condition is an underlying, pre-existing, non work related illness and/or condition. If any work related injury were found, it is not a major cause of disability or the need for medical treatment.
    H. [sic] IME doctor states that the claimant can return to unrestricted activities and is not disabled.
12. On or about March 15, 1999, Eastern received an employee's claim for §34 benefits from April 9, 1998 to date and continuing. Eastern denied the claim on March 18, 1999. The claim was scheduled for a conference on July 6, 1999, but was continued at the request of [the employee's] counsel.
13. On March 15, 2001 the IFB advised Eastern that there was insufficient documentation of criminal conduct which warranted further investigation as to [the employee's] claims.

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[3] I note that the record shows that the employee and her husband operated a limousine service business from their home. Eastern hired Downeast Investigative Services, Inc., to conduct surveillance of the employee's daily activities and her participation in the limousine service business.

14. [The employee] retained new counsel, who filed a new employee's claim received by Eastern on September 19, 1999. In addition to the claim for §34 benefits, the employee filed a claim for §28 benefits alleging serious and willful misconduct by the employer, namely emotional and psychiatric injury resulting from sexual harassment by the employer. Eastern issued a denial of the claims on September 21, 1999.
15. [The employee's] claims were presented at a conference at the Lawrence regional Office of the [DIA] pursuant to G.L. c. 152, §10A on September 23, 1999. [The employee] filed a motion to join her claim for §28 benefits. In his temporary order dated September 27, 1999, [("*Temporary Order*"),] Administrative Judge James L. LaMothe ruled "Based on information available at the time of the conference, I deny the claim for compensation. The employee's claim under Section 28 is joined and denied."
16. On September 29, 1999, [the employee] filed an appeal of the conference order and paid an appeal fee. . . . The appeal was scheduled for hearing pursuant to G.L. c. 152, §11 on April 27, 2000. On March 21, 2000, [the employee's] attorney withdrew [her] appeal prior to the hearing, explaining that [the employee] was terminally ill and did not wish to pursue her claims further.
17. Eastern took no further action with regard to benefits paid by to [the employee.]
18. On September 13, 2001 the [WCRB's] Appeals Subcommittee held a hearing on Ralph's appeal and concluded that Eastern had reported the amount paid on [the employee's] claim, as required by the rules of the Massachusetts Workers' Compensation Unit Statistical Plan. The Bureau has taken the position that it does not have jurisdiction over the issue raised by Ralph's, namely whether [the employee's] claim for benefits was non-compensable.

On June 5, 2001, prior to a hearing before the WCRB, Ralph's sent a letter to the Commissioner stating that it was seeking a recalculation of its experience rating, and a hearing at the Division pursuant to G.L. c. 152, §52D.[4] On June 15, the Division informed Ralph's that such an appeal requires that the matter be first brought to the attention of the appropriate review committee at the WCRB and an appeal to the Commissioner may be filed after an adverse decision is rendered by the WCRB. Ralph's was also informed that if its position was that an appeal should be taken directly to the Commissioner, it should state the reasons for its position. On or about July 17, Ralph's notified the Division that it had requested review of the matter at the WCRB, and the proceedings at the Division were stayed. By letter dated October 5, 2001, Ralph's filed

[4] Ralph's submits a letter dated April 25, 2001, to this docket from the DIA which states that the DIA could take no further action in Ralph's employee's case because the Workers' Compensation Act makes no provision for additional hearings or findings against the employee once the case has reached its conclusion, but that an insured may seek relief against undue surcharges by requesting a hearing before the Division of Insurance. *Ralph's Final Memorandum*, Ex. C.

an appeal with the Commissioner from the September 13, 2001 WCRB decision. *See Joint Statement of Facts*, Number 18, *supra*. In response to a preliminary order issued by the hearing officer on October 10, 2001, Ralph's filed its statement of the case on November 5, and Eastern and the WCRB each filed a response on November 19. A preliminary conference was held on November 27. On January 22, 2002, a *Joint Statement of Facts* was filed. Ralph's filed a motion for an administrative summons for a *subpoena duces tecum* of an investigator at the IFB and IFB files pertaining to Ralph's employee, and the motion was ultimately denied. The parties subsequently engaged in mediating the dispute with a Dispute Resolution Coordinator. On May 2, 2003, the presiding officer sent a letter to the parties, inquiring as to whether Ralph's intended to pursue the appeal, and Ralph's responded in the affirmative May 9. A status conference was held on June 24. On July 8, Ralph's filed a *Motion to Compel Production of Documents* by the IFB pertaining to Ralph's employee, which was denied; and Ralph's filed a *Motion to Compel Production of Documents* by Eastern pertaining to its investigations of the Ralph's employee, which was allowed to the extent that such statements, documents, and records were contained within Eastern's claim files for the workers' compensation claim relating to Ralph's employee. On September 15, the WCRB filed a *Motion for Summary Decision*, which was denied. On September 18, the parties filed a *Joint Statement of Disputed Issues*. On September 24, Ralph's filed a *Motion for an Administrative Summons* of an IFB investigator, and a *Motion for Information* on a former Eastern claims adjuster, which were later denied. On November 21, the WCRB filed a final memorandum, addressing the compensability of the underlying claim. On December 8, Ralph's filed a final memorandum, addressing the issue of compensability. On January 20, 2004, a hearing was held, and Eastern submitted its final memorandum, addressing the issue of compensability.[5]

IV. Ralph's Argument

Ralph's argues that the employee's claim is non-compensable and a revised statistical unit report should be filed for several reasons. Ralph's main argument is that

[5] Ralph's had the opportunity to continue the hearing to another day, but after reviewing the memorandum, chose to proceed with the hearing.

the DIA judge's *Temporary Order* on September 27, 1999, denying payment, is a final determination by the DIA on the employee's claims and such ruling makes the employee's claim non-compensable. Ralph's argues that a decision in a separate DIA matter, *Cerasoli's Case* (DIA Reviewing Board Decision No. 04478292*); Cerasoli v. Hale Dev.*, 13 Mass. Workers' Comp. Rep. 267 (Dec. 5. 1999), supports its position that the DIA *Temporary Order* constitutes a finding of non-compensability.[6] Ralph's compares *Cerasoli* with this matter, asserting, *inter alia*, the following: both cases involve an insurer which paid compensation voluntarily, without prejudice; both insurers later denied the insureds' respective claims; both cases proceeded through conciliation to conference at the DIA; and in both cases a blanket order was issued by a DIA judge, denying the claim. Ralph's points out that in *Cerasoli,* the blanket order of denial was interpreted to mean that *Cerasoli* was not entitled to *any* benefits under the workers' compensation act. Thus, Ralph's argues, the blanket DIA *Temporary Order* in this matter can only be interpreted to mean that the employee was not entitled to any benefits, including the benefits that she had been paid during the period without prejudice, and that she did not have a compensable claim.

In addition, Ralph's argues that contrary to Eastern and WCRB's assertions, liability for the employee's injury was in dispute in this case, like the matter in *Cerasoli*.[7] In particular, Ralph's argues that its owner would never have allowed the acceptance of liability for the employee's claim, and that Eastern never accepted liability in this case, making payments without prejudice. Ralph's asserts that a clear reading of the reasons Eastern listed in Eastern's Notification of Denial show liability was at issue. Ralph's argues that the *Temporary Conference Memorandum Cover Sheet* further supports its position that liability was an issue because it shows the employee filed a claim seeking, *inter alia*, §34 total compensation benefits for the period she had been paid without

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[6] In the *Cerasoli* case, "the reviewing board held that an unappealed conference order denying payment on an initial liability claim was a rejection of the claim *in toto*, notwithstanding the lack of any articulated basis for the denial in the conference order. The very occurrence of a compensable industrial injury is thus presumed to have been denied, and any future claim for that injury is foreclosed." *Fallon v. DOR* (DIA Reviewing Board Decision Nos. 052738-93 and 0426205-96, September 26, 2002) at 2, citing *Cerasoli v. Hale Dev*., 13 Mass. Workers' Comp. Rep. 267, 270 (Dec. 5. 1999).

[7] It is significant to have liability as an issue in a DIA case because the employee is then "forced" to prove that she suffered an industrial injury arising out of and in the course of her employment. *See Fallon v. DOR* (DIA Reviewing Board Decision Nos. 052738-93 and 0426205-96, September 26, 2002 at 3, n. 1.

prejudice, as well as the ongoing §34 total compensation benefits. Ralph's points out that the *Temporary Conference Memorandum Cover Sheet* specifically lists medical issues in dispute to be "disability and the extent thereof; causal relationship or disability and work." Ralph's further points out that the §28 claims involving allegations of sexual harassment were new allegations, and that liability for that claim was at issue at the conference, although it was not explicitly stated on the *Temporary Conference Memorandum Cover Sheet*. Ralph's essentially argues that liability was disputed on the grounds that the April 1998 injury did not arise out of or in the course of the employee's employment, and references Eastern's *Notification of Termination* and Eastern's *Notification of Denial* for the employee's claims, which cites the reasons for Eastern's termination. *See Agreed Statement of Facts*, number 11, *supra*. Ralph's further argues that although Eastern asserts that liability was not an issue at the conference, Eastern continued to pursue an investigation into the employee's claims for almost one year after the *Temporary Order* issued.

Therefore, Ralph's argues that the facts as a whole affirm the conclusion that the employee's claim for benefits for the April 1998 injury was effectively denied by the DIA judge's *Temporary Order*, including any issues relating to liability.

In addition, or in the alternative, Ralph's argues that a specific finding of non-compensability by the DIA is not required to trigger a revised statistical unit report by the insurer under G.L. c 152, § 53A(4). Specifically, it asserts that G.L. c. 152 § 53A(4) deals with issues of workers' compensation rate setting by the Commissioner, and that the Commissioner is allowed under the statute to determine that a claim is non-compensable "based on the evidence before the Commissioner as a result of the DIA proceedings." *Ralph's Final Memorandum* at 4.

In sum, Ralph's asserts, the claim was not compensable, and Eastern is required to file a revised statistical unit report, pursuant to G.L. c. 152, § 53A.

V. Eastern's Argument

Eastern argues that Ralph's assertion that the claim is non-compensable falls short both legally and factually. Eastern asserts that Ralph's has not demonstrated that the

employee's failure to pursue an appeal of the DIA conference order denial renders her claim non-compensable for purposes of calculating an experience modification. Additionally, Eastern asserts that Ralph's reliance on the holding in the *Cerasoli* case to support its argument is misplaced. Eastern asserts that in *Cerasoli* the issue was not whether the claim was compensable, but whether the doctrine of *res judicata* precluded an employee, who did not appeal the original conference order, from further litigating the original liability for his industrial accident. Although the DIA reviewing board concluded that the doctrine applied, Eastern argues that a necessary precondition of the *Cerasoli* holding is that the issue of liability was raised at the conference. This point, Eastern argues, was unambiguously clarified in a later DIA decision, *Fallon v. DOR* (DIA Reviewing Board Decision Nos. 052738-93 and 0426205-96, September 26, 2002), which limited the holding of *Cerasoli* to cases where the insurer raised liability as an issue.

In addition, Eastern argues that liability for the April 1998 injury was not in dispute at the DIA conference, as evidenced by liability not being checked off or noted as an issue on the *Temporary Conference Memorandum Cover Sheet*. Eastern asserts that Ralph's reliance on Eastern's "boilerplate" *Notification of Denial* to demonstrate that liability was an issue raised at conference, without more, is not sufficient. Eastern argues that the only issue before the DIA concerning the employee's §34 claim for benefits for the April 1998 injury was the extent of the disability beyond the period already paid by Eastern. Eastern further argues that the fact that Eastern made no claim against the employee for recoupment of benefits for the amounts it paid demonstrates that liability for the April 1998 injury was uncontested. Eastern concedes, however, that there was one liability issue presented at conference, the §28 claim against Ralph's for serious and willful misconduct, which was joined and denied.

In sum, Eastern argues that it paid benefits for approximately eight months and did not contest the payment of these benefits at the conference. It states that it properly reported the payments of benefits to the WCRB which in turn adjusted Ralph's experience rating. Eastern states that WCRB Appeals Subcommittee affirmed the experience modification, and the *Cerasoli* case is not applicable.

VI. The WCRB's Argument

The WCRB requests that the decision of the WCRB Appeals Subcommittee be affirmed for two primary reasons.

First, the WCRB has argued throughout this proceeding that G.L. c. 152, § 52D provides a statutory basis for appealing to the Commissioner the WCRB's application of the rating system, but that Ralph's never alleged that the WCRB misapplied the rating system. In addition, the WCRB asserts that Ralph's neither alleges that the Appeals Subcommittee's decision was wrong nor alleges any error by the WCRB in calculating the experience rating modification and ARAP factors for Ralph's. Rather, the WCRB points out that Ralph's allegations relate to whether the employee's §34 claim for benefits for the April 1998 injury should have been deemed non-compensable. The WCRB asserts, however, that it does not have jurisdiction over matters relating to employee claims for benefits under the workers' compensation statute, and it has no authority to make the determination about whether the employee's claim for benefits was compensable.

Second, the WCRB argues that a claim is non-compensable within the meaning of G.L. c. 152, § 53A(4) if the DIA issues a finding that the employee's injury did not arise out of or in the course of her employment, but that no such finding was issued by the DIA with regard to Ralph's employee's April 1998 injury. *WCRB Final Memorandum* at 3*, citing Walter A. Zerofski's Case*, 385 Mass. 590, 595 (1982) (to be a compensable harm under the Workers' Compensation Act it must arise from a specific incident or series of incidents at work, or from an identifiable condition that is not common or necessary to all or a great many occupations.) The WCRB argues that there is no basis to conclude that the *Temporary Order*, which was issued by the DIA judge and denied payment, constitutes a final determination by the DIA that the employee's injury did not arise out of or in the course of her employment and was, therefore, non-compensable. The WCRB argues that there is no basis to read *Cerasoli* to stand for the proposition that a conference order is a final determination of issues that are not raised at conference. *WCRB Final Memorandum* at 4, citing *Fallon's Case* (DIA Reviewing Board Decision Nos.

05273893, 04620596, September 26, 2002) at 2. To find otherwise, the WCRB argues, would contravene other DIA Reviewing Board decisions that articulate the principle that an unappealed conference order determines only those issues actually presented to the judge. *WCRB Final Memorandum* at 4, citing *Augiar's Case*, 9 Workers' Comp. Rep. 103 (March 27, 1995) (the conclusive effect of workers' compensation decisions is limited to those issues clearly addressed by the administrative judge); *Heredia's Case*, 10 Mass. Workers' Comp. Rep. 490 (May 31, 1996) (only those issues that were actually presented to the judge at conference are determined for purposes of issue preclusion.)

In addition, the WCRB argues that unlike the circumstances in the *Cerasoli* case, liability was not an issue at the DIA conference on the employee's workers' compensation claim for §34 benefits for the April 1998 injury. To support this view, the WCRB notes that the attorney who represented Eastern at the conference, Mark Sullivan, asserted in this forum that liability for the April 1998 injury was not in dispute at the DIA, and that the only issue before the DIA judge about this injury was the extent of the employee's disability beyond the period already paid by Eastern. The WCRB further asserts that these statements are supported by the contents of the *Temporary Conference Memorandum Cover Sheet.*

Thus, the WCRB argues that the evidence in this case unequivocally establishes that the issue of liability for the employee's April 1998 injury was not presented to the DIA judge at the conference, and therefore there is no basis in fact or law to hold that the *Temporary Order*, denying payment, constitutes a final determination by the DIA that the injury did not arise out of or in the course of her employment, and is therefore non-compensable.

VII. Discussion

The law requires an insurer to submit a revised statistical unit report to the WCRB in the event that a claim, which affects an insured's experience rating, is later found to be non-compensable. G.L. c. 152, § 53A(4). After those claims are removed from the experience rating, the premium for the insured is reviewed and adjusted in a manner established by the Commissioner. *Id*. In this case, Ralph's seeks a revised statistical unit

report from Eastern, asserting that the claim which caused the increase in its experience modification and ARAP factors was non-compensable. Specifically, Ralph's asserts three reasons that a revised statistical unit report should be filed and a subsequent recalculation performed: 1) the DIA issued a *Temporary Order* which effectively denied the employee's claim for §34 benefits for the April 1998 injury; 2) the employee's claim resulted from fraud; and 3) a specific finding of non-compensability by the DIA is not necessary to require a revised statistical unit report to be filed by the insurer because the Commissioner can determine that the claim is non-compensable, and that a revised report should be filed. Ralph's arguments are not persuasive.

This is an appeal, filed pursuant to G.L. c. 152, § 52D, of a decision rendered by the Appeals Subcommittee of the WCRB to not recalculate Ralph's experience rating. An appeal to the Commissioner under G.L. c. 152, § 52D provides for a hearing "on the issue of the manner in which a rating rule has been applied to an insured." *Westland Housing Corp. v. Commissioner of Insurance*, 352 Mass. 374, 378 (1967). The purpose of G.L. c. 152, §52D is to allow an insured to appeal to the Commissioner from the action of an insurer or the WCRB taken after a hearing before the insurer or WCRB. An appeal to the Commissioner is based on the matter presented at the hearing before the insurer or WCRB. It is not a *de novo* review of the underlying claim for compensation which was heard at the DIA. The principal question on appeal to the Commissioner is whether the WCRB made the correct decision based on the record that was before it.

A review of the records of the Appeals Subcommittee meeting show that Eastern and Ralph's presented argument to the Appeals Subcommittee about whether the DIA found the claim non-compensable. As the WCRB asserts, it is not authorized by law to make the determination whether a claim is compensable. Such determinations are properly made by the DIA, which has jurisdiction over the adjudication of contested cases governed by the Workers' Compensation Act. *See* G.L. c. 152, §§10, 10A, 11, 11C; Leonard Y. Nason *et al.,* 29 *M.P.S. Workers' Compensation* § 14.1 (2002). *See generally Appeal of Franklin County Home Care Corporation*, Docket No. W2000-06 (issues relating to benefit claims under workers' compensation policies are within the jurisdiction of the DIA). The WCRB did not make any determination about the compensability of the claim, but rather it specifically found that Eastern correctly

reported the amount Eastern paid on the claim. The WCRB's denial of Ralph's appeal meant that Eastern was not required to file a revised unit statistical plan, and that Ralph's experience modification and ARAP factors would not be recalculated. Ralph's offers no persuasive support for its request to reverse the WCRB's decision.

There was no finding by the DIA that the employee's claim for §34 benefits for the April 1998 injury was a non-compensable claim within the meaning of G.L. c. 152, §53A that should be removed from Ralph's experience rating. Generally, the amount of premium charged an insured is based in part on a prediction of total losses for the policy term. Ralph's workers' compensation insurance premium is calculated by the WCRB using experience modification and ARAP factors, which are designed to reflect Ralph's particular workers' compensation loss experience. Although the statute allows for a claim to be removed from the calculation of the experience rating in the event the claim is "found to be non-compensable," the DIA's *Temporary Order* in this matter states little about the claim it denied, and it involves an incident in which benefits had been paid and additional compensation was sought. *See Joint Statement of Facts*, Numbers 6, 12, 14, and 15, *supra.*

In addition, both the WCRB and Eastern correctly assert that a finding of non-compensability cannot be deduced from the *Temporary Order* for purposes of recalculating Ralph's experience rating because the issue before the DIA on the employee's §34 benefits claim for the April 1998 injury was the extent of the disability beyond the period already paid, not liability for that claim. The stipulated facts state that the doctor who examined the employee at Eastern's request determined that the employee was not at a medical end result at approximately six months after the alleged injury, and that her activities were causally related to the alleged accident. Further, the stipulated facts state that the employee was found by that doctor to be at a medical end result approximately eight months after the alleged injury and, based on those findings, Eastern sent a notice of termination of benefits four days later. In total, Eastern paid benefits with out prejudice from April 1998 to December 1998 to Ralph's employee. In view of the doctor's findings, as well Eastern's assertions, and all the notations on the DIA *Temporary Conference Memorandum Cover Sheet* referenced by the parties, I am persuaded that the only issue at the subsequent DIA conference for the employee's §34

claim for benefits for the April 1998 injury was the extent of disability beyond the period paid.

Further, Ralph's reliance on the holding in *Cerasoli* is misplaced. *Cerasoli* stands for the proposition that a general order of denial by the DIA on an initial liability claim bars future claims for that injury on *res judicata* principles because the very occurrence of a compensable industrial injury is presumed to be denied. *See Fallon v. DOR* (DIA Reviewing Board Decision Nos. 052738-93 and 0426205-96, September 26, 2002) at 2. This stems from both the burden which is placed on the employee to prove that she suffered an industrial injury arising out of and in the course of her employment when liability is an issue at a DIA conference, and that the parties are bound to all matters covered by a subsequent unappealed conference order, which denies the claim. *See generally Fallon v. DOR* (DIA Reviewing Board Decision Nos. 052738-93 and 0426205-96, September 26, 2002) at 3, n. 1. But there is no basis for reading *Cerasoli* to stand for the proposition that a conference order is a final determination of issues that are not raised at conference. *Id.* at 3. In addition, *Cerasoli* does not address whether a loss should be reflected in an insured's experience rating. The Division will not presume that this general *Temporary Order* issued by the DIA constitutes a finding that the entire claim is non-compensable for purposes of recalculating an experience rating when both Eastern and the WCRB have argued persuasively in this forum that the issue before the DIA about the employee's §34 claim for benefits concerned the extent of disability *beyond the period already paid*. The general *Temporary Order* "denying the claim for compensation," therefore, does not constitute a decision that the §34 claim for benefits for the period paid was non-compensable within the meaning of G.L. c. 152, §53A.

Further, Ralph's has not demonstrated that the claim was non-compensable based on its allegations that the claim was fraudulent. Although the Commissioner has the authority to determine that insurers, individuals, or other persons, as defined by G.L. c. 176D, §1, have committed an unfair or deceptive act or practice in the business of insurance, she does not have investigative authority with respect to workers' compensation claimants. In addition, this record shows that the IFB, an entity responsible for assisting in the prevention, detection, and prosecution of fraudulent insurance transactions, conducted an investigation and found insufficient evidence of

criminal conduct to warrant further investigation. *See Ralph's Statement of Case*, Ex.2 (IFB Letter to Eastern).

Finally, Ralph's argues that even without a finding of non-compensability by the DIA, the Commissioner can determine that a claim is non-compensable and require a revised statistical unit report to be filed with the WCRB. Ralph's misconstrues the Commissioner's statutory grant of authority under the G.L. c. 152, §53A: the statute gives the Commissioner oversight over the classification of risks and premiums for workers' compensation insurance, but it does not authorize the Commissioner to find a particular workers' compensation claim compensable or non-compensable. As stated above, the determination of compensability is properly made by the DIA. In addition, §53A clearly sets forth a particularized procedure: after a claim is found non-compensable, the insurer files a revised report and the claim is removed from the experience rating calculation by the WCRB. Section 53A grants the Commissioner the authority to oversee the way in which the affected insured's premium is reviewed and adjusted after a finding of non-compensability has been made and the revised report is filed by the insurer. In this instance, however, the only issue before the DIA on the employee's §34 claim for benefits was the extent of disability beyond the period already paid, not liability for the claim itself. Thus, the claim for benefits for the period which was voluntarily paid by Eastern is part of Ralph's loss experience, and it was properly considered a compensable claim for purposes of calculating its experience rating.

VIII. Conclusion

On this record, I conclude that the WCRB's decision was correct. Accordingly, the WCRB's decision is AFFIRMED.

So Ordered.

DATE: 8/12/04

/s/
Susan H. Unger
Presiding Officer

This decision may be appealed to the Commissioner, pursuant to G.L. c. 26, §7.